In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1960

NO. .....

STATE TAX COMMISSION OF THE STATE OF ARIZONA, *Petitioner*

v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Your petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Arizona entered January 31, 1961.

OPINION OF THE COURT BELOW

The majority opinion and the dissenting opinion of the Supreme Court of the State of Arizona were filed and entered on March 30, 1960 in the above entitled case numbered 6853 and is reported in 87 Ariz. 268, 350 P.2d 674. A motion for rehearing was denied on April 19, 1960, and the mandate of the Supreme Court of Arizona to the lower court issued on April 27, 1960, giving finality to the decision. The State Tax Commission of the State of Arizona timely petitioned this Court for its writ of certiorari, number 1028, October Term. This Court on October 10, 1960, number 68, October Term 1960, 364 U.S. 289 (Preliminary Print, Advance Pamphlet No. 2), entered its memorandum decision granting the petition for the writ of certiorari. This Court then vacated the judgment of the Supreme Court of the State of Arizona and remanded the case to that court for clarification. The Supreme Court of Arizona issued its opinion in clarification and entered its judgment

reinstating the earlier judgment on January 31, 1961. Therefore, your petitioner now prays that the judgment as clarified be certified to this Court for review. The supplemental opinion of the Supreme Court of Arizona is included herein as Appendix V.

JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257, United States Code and Rule 19 of this Court upon the grounds that the decision of the trial court and the majority opinion of the Supreme Court of Arizona determined that the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301, et seq., Arizona Revised Statutes, upon respondent for sales of personal property made in Arizona, was prohibited by Article 1, Section 8 of the Constitution of the United States, as being a burden on interstate commerce.

The following cases sustain the jurisdiction of this court:

a. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33

b. *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70

c. *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62

HOW FEDERAL QUESTION IS RAISED

Respondent, on March 28, 1957, brought suit for Transaction Privilege Taxes which it had paid under protest, pursuant to Section 42-1339 of Arizona Revised Statutes. The sole question in the lower court was whether or not respondent's sales in the State of Arizona, upon which the transaction privilege taxes were levied, were immune from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. This question was raised by respondent in the allegations of its complaint, paragraph V, and paragraph 3 of the Protest attached to said complaint. (See Appendix III). The judgment of the trial court, Maricopa County Superior

Court, Phoenix, Arizona, entered December 23, 1958, was for respondent on precisely this basis, that the taxes levied were an unconstitutional burden on interstate commerce. (See Conclusion of Law No. 8 of said Judgment which is Appendix IV.) The case was appealed to the Arizona Supreme Court and the majority opinion was decided solely on the same grounds as the lower court's decision, that the tax levied upon the respondent's sales in question was an unconstitutional burden on interstate commerce. The dissenting opinion took precisely the opposite view, stating that Article 1, Section 8 of the United States Constitution did not bar the levy of the taxes in question because respondent had engaged in sufficient localized activities in the State of Arizona to sustain a levy of the tax.

This conclusion is reinforced beyond all possible doubt by the clarification opinion rendered in response to the mandate of this court. (Appendix V). In this clarification the Supreme Court of Arizona specifically stated that the sufficiency of the Arizona Transaction Privilege Tax to reach the sales, had they not been interstate, was not at issue. The decision is grounded solely on the holding of the court that the interstate commerce clause of the constitution of the United States protected the sales from state taxation.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article 1, Section 8 of the United States Constitution:

> "The Congress shall have the power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

QUESTION PRESENTED FOR REVIEW

The precise question in this case is just how far can an out-of-state seller act beyond mere localized solicitation activities before the total picture of his localized activities constitutes a sufficient jurisdictional basis upon which the State of Arizona can levy its

transaction privilege tax upon the sales involved, without such taxation being an unconstitutional burden on interstate commerce. The question which is presented, because of the fact situation involved, falls directly between the decisions of this Court in *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327, and *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, and there is no federal or state case directly in point or closely related thereto.

STATEMENT OF THE CASE

Respondent is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Substantially, all its manufacturing activities are carried on in Texas and none in Arizona. Its home office is in Dallas, Texas and it has a branch office in Fresno, California. (A.R. 13).

Respondent has a full-time sales engineer, W. J. Simmons, who solicits all sales made by it in the State of Arizona. He either makes the sale himself or is involved in nearly every sale of respondent's products in this state. (A.R. 15, 65). He is paid on the basis of all sales made by respondent in this state. (A.R. 65). All his orders, however, are accepted in either Fresno, California or Dallas, Texas. All credit processing is done there, and payments are made there also. All products are shipped to the customers F.O.B. Dallas (A.R. 15). Respondent maintains a local office at the offices of Food Machinery & Chemical Corporation, Phoenix, Arizona, and here its representative meets customers, keeps files, dispenses technical assistance, and meets with and directs respondent's erector. Most of respondent's customers are aware of and make contact through this local office. (A.R. 47, 48, 50).

The respondent's erector, a Mr. May, is a full-time employee stationed in Arizona who is highly and specially trained in the operation and erection of cotton gins. He erects and assembles the cotton gins when received here, after being shipped in a knocked down condition. (A.R. 59, 68, 70). Most of his time is spent in

such erection activities but he is available for and spends considerable time repairing and servicing respondent's products for its customers. Respondent's customers are aware this service exists in Arizona and make use of it. (A.R. 68, 70).

Respondent also maintains a stock of repair parts for its products at the same location where its sales engineer has his office, Food Machinery & Chemical Corporation, Phoenix, Arizona. (A.R. 14). This stock of parts is on consignment to that company and it handles all sales and collects Arizona Transaction Privilege Tax on all sales of such parts. The parts, however, belong to respondent. The fact that these repair parts are available locally is known to respondent's customers and a large number of repair parts are there sold. (A.R. 51, 52). For the right to carry such repair parts on consignment, Food Machinery makes available to respondent's sales representative the use of an office, telephone and office equipment. (A.R. 33). This arrangement is carried out in various Food Machinery & Chemical Corporation offices located in other states and thereby creates in each area so served a centralized location for respondent's customers to go for service of all their needs regarding respondent's products. (A.R. 33).

The audit period involved in this case was January 1, 1954, to September 30, 1956, and during this period respondent made sales to Arizona customers of $1,180,621.62 on which an Arizona Transaction Privilege Tax of 2% was paid on $442,864.48 or a total tax paid of $8,857.29. (A.R. 20). Arizona Transaction Privilege Taxes were not paid on sales of $737,757.14 made to Arizona customers. The only difference between the sales on which taxes were paid and those on which taxes were not paid was that in all cases in which respondent's customers paid to it an amount to cover the Arizona Transaction Privilege Tax in addition to the purchase price, respondent paid the taxes to petitioner. (A.R. 20). Respondent failed to remit the tax in all cases where its customers refused to pay the tax, or an additional amount to cover the tax. (A.R. 20)